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No. _____

In the
Supreme Court of the United States
October Term, 1993

WINSTON BRYANT, in his official capacity as
Attorney General,
Petitioner,

v.

BOBBIE E. HILL, et al.,
Respondents.

Petition for Writ of Certiorari to the
Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF AMICUS
CURIAE OF CITIZENS FOR TERM LIMITS
AND PACIFIC LEGAL FOUNDATION
IN SUPPORT OF PETITIONER, WINSTON BRYANT

RONALD A. ZUMBRUN
ANTHONY T. CASO
*DEBORAH J. LA FETRA
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amici Curiae

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Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) and Citizens for Term Limits (CTL) respectfully seek leave to submit this brief amicus curiae in support of petitioner, Winston Bryant. Consent to the filing of this brief has been granted by counsel for petitioner and has been lodged with the Clerk of this Court. Respondent

Bobbie E. Hill has withheld consent necessitating the filing of this motion.

IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Citizens for Term Limits is the parent organization of the campaign committee that spearheaded the petition drive and campaign support for California's Proposition 164. Proposition 164, like Arkansas' Amendment 73, restricts ballot access of California's congressional incumbents after those incumbents have served for a set number of terms in the House of Representatives and the Senate of the United States. It is Citizens for Term Limits' policy to support congressional term limits in California as well as all other states. Citizens for Term Limits has intervened in the case challenging Washington's Initiative 573, now pending in the Ninth Circuit Court of Appeals (*Thorsted v. Gregoire*, Consolidated Docket Nos. 94-35222, 94-35223, 94-35267, 94-35285, 94-35287, 94-35289).

Pacific Legal Foundation and Citizens for Term Limits are submitting this brief because they believe their public policy perspective and litigation experience in the ballot access restriction arena will provide an additional viewpoint with respect to the issues presented. PLF has participated in numerous cases before this Court including participation in *Legislature of the State of California v. Eu*,

54 Cal. 3d 492 (1991), *cert. denied*, ___ U.S. ___, 117 L. Ed. 2d 516 (1992), *Chisom v. Roemer*, 501 U.S. ___, 115 L. Ed. 2d 348 (1991), *League of United Latin American Citizens v. Attorney General of Texas*, 501 U.S. ___, 115 L. Ed. 2d 379 (1991), and *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).

PLF and Citizens for Term Limits believe the Arkansas Supreme Court incorrectly analyzed the relationship between Amendment 73 and the Qualifications Clauses of the United States Constitution. U.S. Const. Art. I, §§ 2, 3. The minimal qualifications imposed by Sections 2 and 3 of age, residency, and citizenship are simple, straightforward qualifications that a candidate either possesses or not. Amendment 73, instead of disqualifying certain incumbents from serving, only restricts certain incumbents' names from the ballot for the same office for which they previously served. This is a question of ballot access, not qualifications. When analyzed under this Court's ballot access cases, Amendment 73 must be upheld as constitutional. These points may not be adequately covered by the parties whose interests may not extend beyond the Arkansas borders. Citizens for Term Limits and PLF, concerned with preserving ballot access restrictions for California's 54 congressional incumbents, are uniquely situated to analyze the issues involved in this case and to bring a wider scope of policy considerations to this Court.

For the foregoing reasons, Citizens for Term Limits and Pacific Legal Foundation requests that its motion to file the amicus brief which follows be granted.

DATED: May __, 1994.

Respectfully submitted,

RONALD A. ZUMBRUN
ANTHONY T. CASO
*DEBORAH J. LA FETRA
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

By _____
DEBORAH J. LA FETRA
Attorneys for Amici Curiae

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BRIEF AMICUS CURIAE OF CITIZENS FOR TERM
LIMITS AND PACIFIC LEGAL FOUNDATION IN
SUPPORT OF PETITIONER, WINSTON BRYANT

INTERESTS OF AMICI CURIAE

The interests of amici curiae are set forth in the
preceding motion and are adopted herein.

OPINION BELOW

The opinion of the Arkansas Supreme Court is reported as *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 1994 WL 72581 (1994). The court held, *inter alia*, that ballot access restrictions on long-term incumbents violated the United States Constitution's Qualifications Clauses for members of Congress.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1 lists among the considerations governing review on certiorari the circumstance when a lower court has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court, federal Courts of Appeals, or state high courts. The issues decided by the Arkansas Supreme Court are of the utmost national importance and the decision conflicts with cases decided by this Court as well as other lower courts. Citizens for Term Limits also informs the Court that Citizens for Term Limits, pursuant to Supreme Court Rule 11 and 28 U.S.C. §§ 1254(1), 2101(e), has recently filed a petition for writ of certiorari before judgment in *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994), now pending in the Ninth Circuit Court of Appeals. Citizens for Term Limits encourages this Court to grant both petitions in concert to have the greatest possible variation before it of this type of initiative.

ARGUMENT**I****THIS CASE INVOLVES IMPORTANT
ISSUES OF LAW THAT SHOULD
BE RESOLVED BY THIS COURT**

- A. Although Many State and Federal
Circuit Courts Have Not Yet Ruled
on the Issue of Ballot Access
Restrictions Based on Incumbency,
the Issue Is of Such Vital Importance
as to Require Immediate Resolution**

Without question, the issue of congressional "term limits" is the single most important governance issue to come before this Court in decades. In 1992, no less than 14 states voted (by margins ranging from 52% to 77%) to enact some form of ballot access restriction on the long-term incumbents in Congress. The national groundswell of support for this method of reining in unaccountable political careerists shows the mandate of the People for change in the halls of Congress. Despite the clear election victories for "term limit" proponents, opponents of the measures have taken their complaints to court. Ruling without the clear guidance of this Court on this issue, courts have erred on the side of the status quo, so far declaring measures affecting congressional elections constitutionally invalid.

Fifteen states have enacted ballot access restrictions or absolute term limits. Several other states have similar measures on the ballot to be voted on during this year's elections. Certain state legislatures have also discussed enacting term limit measures. Guidance from this Court is

therefore needed immediately to inform voters and lawmakers of the constitutionality of their efforts.

**B. This Court Should Not Delay
Resolution of This Case**

The extraordinary nature of this case should encourage this Court to make an exception to its usual practice of requiring issues to percolate in the lower courts before this Court will address them. The serious consequences of lower courts invalidating actions taken by a substantial number of states should compel this Court to take the unusual, but necessary, step to resolve this issue as quickly as possible. The lower court cases that have addressed ballot access restrictions similar to that presented in the case at bar have decided those cases well in advance of the practical effective date of the provisions because of the important public issues involved and the unlikelihood of any substantive change affecting the laws. For example, in *Legislature v. Eu*, 54 Cal. 3d 492, 500 (1991), *cert. denied*, ___ U.S. ___, 117 L. Ed. 2d 516 (1992) the California Supreme Court upheld the constitutionality of a state term limit measure that would not affect any sitting legislator until 1996. The court noted that the "issues are of great public importance and should be resolved promptly." *Id.*

Other cases (in the context of determining ripeness) have also emphasized the need for early adjudication in some circumstances. In *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985), this Court, upon determining that the issues involved were purely legal and in need of no further factual clarification, found that nothing would be gained by postponing a decision "and the public interest would be well served by a prompt resolution of the constitutionality of [the law]." *Id.* at 582. Citing *Thomas*, among other Supreme Court cases, the Seventh Circuit Court of Appeals in *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 226 (7th Cir. 1993), decided a case involving

a challenge to a rule affecting the speech of candidates for judicial office, even though the rule applied only to candidates who were campaigning and the two plaintiffs (sitting judges) were neither candidates nor campaigning. One plaintiff could not become a candidate (in a retention election) until 1998 at the earliest and the other not until 2002.

These cases strongly suggest that important issues affecting the public, especially in the context of elections, should be resolved as quickly as possible to assure both candidates and voters that their participation in an election is valid, with the results of that election upheld.

II

THIS CASE CONFLICTS WITH RULINGS OF THIS COURT AND OTHER LOWER COURTS

A. The Decision Below Conflicts with Qualifications Clause Cases

The Qualifications Clause for the House of Representatives states:

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

U.S. Const. Art. I, § 2. The Qualifications Clause for the United States Senate states:

No Person shall be a Senator who shall not have attained to the Age of thirty Years and been nine Years a Citizen of the United

States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

U.S. Const. Art. I, § 3. These two clauses codify what the Framers thought to be the minimum necessary requirements to assure mature, loyal, and patriotic legislators.

Storer v. Brown, 415 U.S. 724 (1974), is the only major case decided by this Court which addresses the Qualifications Clause in the context of a ballot access restriction. *Storer* makes clear that the denial of ballot access does not establish an additional qualification. *Id.* at 746 n.16. The reason for this distinction is that states are given the initial task of determining the qualifications of voters who will elect members of Congress. Article I, Section 4, Clause 1, authorizes the states to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." *Storer*, 415 U.S. at 730.

The States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates. ... [T]he rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause.

Storer, 415 U.S. at 730. In *Storer*, this Court upheld a California statute which forbade a ballot position in a general election to an independent candidate if he or she had

registered affiliation with a political party within one year prior to the preceding primary election. That statute also required the candidate to file a nominating petition with not less than 5% of the entire vote cast in the preceding general election. *Storer*, 415 U.S. at 726-27, 733. *Storer* noted that an independent candidate need not stand for primary election but must qualify for the ballot by demonstrating substantial public support in another way. Other than the alternate means of qualifying to have his or her name preprinted on the ballot, the qualifications required of the independent candidate are very similar to, or identical with, those imposed on party candidates. *Storer*, 415 U.S. at 733. The disaffiliation requirement does not change its character when combined with other provisions of the electoral code. "It is an *absolute bar to candidacy, and a valid one.*" *Storer*, 415 U.S. at 737 (emphasis added).

Despite the language in *Storer*, this Court has never explicitly stated a test to determine whether a restriction amounts to a qualification within the meaning of the Qualifications Clauses. The First Circuit, however, addressed this definitional problem in *Hopfmann v. Connolly*, 746 F.2d 97, 103 (1st Cir. 1984), *vacated on other grounds*, 471 U.S. 459 (1985).¹ The plaintiff in that case challenged a political party rule that only candidates with 15% of the vote at convention may challenge the convention's endorsement in a state primary. The court held that this rule did not add a qualification for office beyond age, residency, or citizenship. Rather, it adds a restriction on who may run in the party primary for statewide political office and potentially become the party's nominee. The court emphasized that the candidate was free to run as a write-in. *Id.* The First Circuit held that the test to determine whether

¹ On remand, the First Circuit stated that its earlier decision on this issue remained undisturbed by the Supreme Court. *Hopfmann v. Connolly*, 769 F.2d 24, 25 n.1 (1st Cir. 1985).

or not the "restriction" amounts to a "qualification" within the meaning of Article I, Section 3, is whether the candidate "could be elected if his name were written in by a sufficient number of electors.'" *Hopfmann*, 746 F.2d at 103.

The *Hopfmann* case was favorably cited in *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821, 832 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993). That case arose from former Senator Wyche Fowler's loss to Paul Coverdell in a run-off election. Although Fowler himself did not bring suit, a "consumer" organization along with four Fowler supporters sued to overturn Georgia's "majority rule" statute. *Id.* at 824. This statute requires that a candidate must receive a majority of votes cast (instead of a plurality) to be declared the winner. Fowler had won a plurality in the general election but lost the run-off election. *Id.* at 823-24. Addressing the Qualifications Clause argument, the court first noted that, based on *Hopfmann's* analysis, Fowler was not precluded from obtaining the office he sought—he simply had to participate in the run-off. *Public Citizen*, 813 F. Supp. at 832. Moreover, the *Public Citizen* court found that the majority vote statute does not violate the Qualifications Clause because "the majority vote statute is more accurately interpreted as a method for construing the meaning of the votes cast." *Id.* at 833. That is, it was construed as regulating the "manner" of elections as provided by Article I, Section 4, of the Constitution.

In *O'Sullivan v. Swanson*, 257 N.W. 255 (Neb. 1934), the Nebraska Supreme Court addressed a statute which prohibited unsuccessful primary candidates from having their names placed on the general election ballot for any state or federal office. The court upheld the law against a challenge from a candidate whose name was not printed on the ballot for United States Senate because he had lost at a primary election for governor during the same election the Senate primary was held. *Id.* at 255-56. The court upheld the statute because it did not prohibit O'Sullivan from

running for the office: he was permitted to conduct a write-in campaign. *Id.* at 256. Such might have been a strong practical deterrent to election but, nonetheless, he could run, and the statute was upheld.

The decision of the Arkansas Supreme Court conflicts with each of these decisions from this Court, two Circuit Courts of Appeals, and a state Supreme Court. To resolve this conflict, the petition for writ of certiorari should be granted.

**B. The Decision Below Conflicts with
Ballot Access Decisions of This Court**

The Arkansas Supreme Court's error stems from its refusal to treat Amendment 73 as the ballot access measure that it is. As described above, Amendment 73 cannot be a qualification because an incumbent barred from the ballot could still serve if elected or appointed. The plurality opinion below erroneously invalidated the congressional officeholder provisions of Amendment 73 on Article I grounds and never addressed the ballot access cases in that context. Petition (Pet.) at 15a. Importantly, the court below did address this Court's ballot access cases in the context of ballot access restrictions for *state* legislators, thus indicating the result it would have reached had these cases been applied to the provisions affecting congressional officeholders. In the state legislator context, the court followed the decisions of this Court in *Burdick v. Takushi*, 504 U.S. ___, 119 L. Ed. 2d 245 (1992), *Anderson v. Celebrezze*, 460 U.S. 780 (1983), *Clements v. Fashing*, 457 U.S. 957 (1982), and *Bullock v. Carter*, 405 U.S. 134 (1972). Pet. at 20a-21a. After weighing the interests of the incumbents in perpetuating their careers against the People's desire to encourage rotation in office to promote greater accountability and responsiveness in their representatives, the Arkansas court concluded,

the state interest, as expressed in the Preamble to Amendment 73, is sufficiently rational and *even compelling* when weighed against the residual burden placed on the rights and privileges of elected officeholders and those desiring to support them.

Pet. at 22a (emphasis added).

In dissent, one Arkansas justice did reach the ballot access issue with respect to congressional officeholders. Special Chief Justice Cracraft based his opinion on the very distinction the plurality refused to acknowledge: "I do not view the provisions of Amendment 73 to the Arkansas Constitution as raising a 'qualifications' issue, but rather a ballot access issue to be measured by the First and Fourteenth Amendments to the United States Constitution." Pet. at 37a. Justice Cracraft notes that the Qualifications Clauses begin with the phrase "[n]o person shall *be*" a representative or senator, a choice of words demonstrating a reference to *service* in Congress, not the manner of election. Pet. at 39a (emphasis in original). Justice Cracraft then properly examined the initiative in light of the First and Fourteenth Amendments (citing *Anderson* and *Burdick*). He found it "not constitutionally infirm in any respect." *Id.*

Because the Arkansas Supreme Court did not apply the relevant Supreme Court case law to Amendment 73, it erroneously declared provisions of that amendment to be invalid under the federal Constitution. To rectify this error, and to provide necessary guidance to the numerous courts which are currently (or are likely to be in the future) called upon to rule on these important issues, the petition for writ of certiorari should be granted.

CONCLUSION

Review by this Court is necessary to resolve this question of national importance. Amici curiae respectfully urge this Court to grant the petition for writ of certiorari and reverse the judgment of the Arkansas Supreme Court insofar as it invalidates the provisions of Amendment 73 limiting congressional incumbents from appearing on the ballot.

DATED: May, 1994.

Respectfully submitted,

RONALD A. ZUMBRUN

ANTHONY T. CASO

*DEBORAH J. LA FETRA

*Counsel of Record

Pacific Legal Foundation

2151 River Plaza Drive,

Suite 305

Sacramento, California 95833

Telephone: (916) 641-8888

Attorneys for Amici Curiae